No. 3434

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

HARRY NUDELMAN,
Plaintiff in Error,

vs.

THE UNITED STATES OF AMERICA,
Defendant in Error.

Brief of Defendant in Error

Upon Writ of Error to the United States District Court for the District of Oregon

LESTER W. HUMPHREYS,
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STATEMENT

The plaintiff in error, hereinafter referred to as the "defendant", has, in his brief, grouped his assignments of error under five heads, and they are considered herein in the same grouping and order, namely:

I.

The defendant could not be guilty of stealing property and at the same time be guilty of receiving such stolen property, knowing it to have been stolen.

II.

The indictment does not state a crime.

III.

There was a fatal variance between the allegations of the indictment and the proof.

IV.

There was no proof sufficient to go to the jury showing that the tubes in the possession of the

defendant were the same tubes as those claimed to have been stolen.

V.

The defendant being authorized by the consignee to receive and take the goods in question from the carrier, could not be guilty of stealing such goods.

I.

Defendant contends that he could not be guilty of stealing property and at the same time be guilty of receiving stolen property.

Defendant has evidently failed to read the indictment carefully. It will be noted that the act under which this indictment is brought (Act of Feb. 13, 1913; 37 Stat. L. 670) makes it an offense "to steal, or unlawfully take, carry away, or conceal, * * * * or buy, or receive, or have in his possession * * * * knowing the same to have been stolen * * * * goods moving as or a part of an interstate shipment."

The indictment, in the first count, charges that the defendant did, on a certain date, "steal, carry away, and conceal" certain goods and

chattels (Trans. p. 5). The following counts charge that on subsequent dates the defendant had in his possession a part of these goods and chattels, knowing them to have been stolen. (Trans. p. 6-10). He is not charged with the commission of two crimes by the same act, nor would one of these offenses necessarily be included in the other. They might be committed by the same or by different persons.

> "The intention of Congress is to punish those who steal and carry away property which constitutes an interstate shipment, or those who receive it, or those who have it in their possession. The very nature of interstate commerce in which goods may pass through any number of districts from one boundary of the United States to the other is such that Congress evidently intended that having in possession such property with guilty knowledge should subject the accused to prosecution in any district where the offense should be shown to have been committed, without regard to the fact that the defendant himself may have been the thief."

United States v. Sullivan, 250 Fed. 632.

Since the charges in the counts are not inconsistent and arose from the same transaction, it was proper to join them in the same indictment (Sec. 1024, Revised Stat.), and the allowance or refusal of a motion to elect rests in the sound discretion of the trial court which should not be disturbed except in a clear case of abuse (Gardes v. United States, 87 Fed. 172).

The instructions of the court were clear on this point and defendant was in no way prejudiced by allowing the jury to consider all counts. (Trans. pp. 65, 66).

II.

It is contended that the indictment does not state a crime in the following particulars:

1. That count one of the indictment does not describe the owner, bailee, or custodian of the goods;

2. That the remaining counts do not allege that the goods when stolen were in interstate commerce or were stolen from a railroad car, etc.

In answer to the first contention it is only necessary to refer to the indictment itself which alleges that the goods were "in the custody and

control of said Oregon-Washington Railroad & Navigation Company" (Trans, p. 6). In urging this point, defendant may have had in mind the fact that the evidence shows that the goods were in the custody and control of the Railroad Administration as the operator of the carrier named. This question, however, is considered in another part of this brief.

Defendant's contention as to counts two to six, inclusive, is, in our opinion, the only meritorious exception in the record. These counts are not as definite as they could have been and should have been through more careful preparation, but the jury found the defendant guilty on all counts and regardless of the defects in counts two to six, inclusive, the verdict is sufficient if there is one good count to sustain it (Powers v. United States, 223 U. S. 303).

III.

Appellant contends that there is a fatal variance in two particulars:

1. That the indictment alleges that the goods were stolen from a certain car standing in a certain freight yard (Trans. p. 5) while the evi-

dence is that the goods were stolen from a freight house in the same freight yard; (Trans. p. 42, 44).

2. That the indictment alleges that the goods were taken from the custody and control of the Oregon-Washington Railroad & Navigation Company (Trans. pp. 5 and 6), while the evidence is that they were taken from the custody and control of the United States Railroad Administration as the operator of said railroad company. (Trans. pp. 50, 51, 52).

In support of his contention appellant cites a number of state decisions. We will not discuss these citations as they have no bearing on this case. Whatever may be the law in the various states, under the federal practice, a variance, to be material must be of substance and not of form.

> "No indictment found and presented by a grand jury in any district or circuit or other court of the United States shall be deemed insufficient, nor shall the trial, judgment, or other proceedings thereon be affected by reason of any defect or imperfection in matter of form only, which shall not tend to the prejudice of the defendant."
>
> Sec. 1025, Revised Statutes.

And the test seems to be whether or not the variance is of such a nature as to mislead the defendant in preparing his defense, and to leave the way open for another prosecution for the same crime.

> "Upon the question of variances between indictments and proofs the controlling consideration should be whether the charge was fairly and fully enough stated to apprise defendant of what he must meet, and to protect him against another prosecution, and whether those particulars in which the proof may differ in form from the charge support the conclusion that respondent could have been misled to his prejudice."

Harison vs. United States, 220 Fed. 662.

> "The essential things involved are that the record should be in such shape as to protect the respondent against a second prosecution for the same offense and as fairly to inform the respondent of the crime intended to be alleged."

Bennett vs. United States, 194 Fed. 630; 227 U. S. 333.

"The tendency of most of the courts at this day, and especially the Supreme Court of the United States, is to disregard technicalities, which can in no way be prejudicial."

Morris vs. United States, 229 Fed. 520.

It is difficult to understand how defendant could have been misled by charging him with taking the goods from one place in a certain freight yard when as a matter of fact he took them from another place in the same freight yard, but a few feet away. The indictment charges defendant with theft of the goods while in interstate commerce and the particular place of the theft is immaterial so long as it was within the court's jurisdiction and is alleged with sufficient certainty to correctly inform the defendant of the particular charge against him. In indictments for larceny, allegations of place like allegations of time, need not be proved as alleged unless material to the jurisdiction of the court or an element of the offense itself.

25 Cyc. 84.

The name of the carrier having custody of the goods was alleged in the indictment as the "Ore-

gon-Washington Railroad & Navigation Company," this same carrier while being operated under federal control and at the time of the theft, was known as the "Oregon-Washington Railroad & Navigation Lines" (Trans. p. 52). The only change in name being the substitution of the word "lines" for "company."

This variance could in no way mislead the defendant, nor is it fatal to the validity of the indictment.

> "It is not essential to the validity of an indictment * * * * that ownership in either the place or the articles be distinctly alleged."

Kasle vs. United States, 233 F. 878.

In the case cited above the goods were alleged to have been taken from a certain station house without a distinct allegation as to the ownership of either the goods or the station.

The court in commenting upon this omission said:

> "While such objections as we have been considering might be avoided, and ought to be, through careful preparation of indictment, still it is plain enough that the act of Congress

here involved was not intended to require strict observance of either all the rules of the common law upon the subject of certainty in criminal pleading, or those growing out of distinct statutes which were intended to change and modify many of such rules. It is to be observed, too, that the relevancy or not of decisions, which in large measure are controlled by local statutes, is to be tested by comparison of those statutes with the particular statute in issue. The act now in question is designed to protect articles which are in course of interstate shipment. When the articles of freight now in dispute are considered in connection with their points of origin and destination and the "railroad station house," as such points and station are described in the counts, it is clear that for purposes of the indictment the freight articles are to be treated as having been 'in course of shipment in interstate commerce' at the times they were alleged to have been stolen; and it is equally clear that when defendant was required to meet the allegations charging him with having possession of the articles his opportunities for identifying them

were quite as available as they would have been if title to the articles, and also to the station, had been laid in the name of the owner of the station. The station was the natural place for the custody and control of such articles until the movement toward their fixed destinations should actually be resumed; and the charge made in the indictment that the goods were 'stolen, taken and carried away' from this station, may be said to have followed the language of the statute."

Kasle vs. United States, 233 Fed. 884.

In the case of Putnam vs. United States, 162 U. S. 687, the indictment charged the defendant with defrauding the "National Granite State Bank," "Carrying on a national banking business at the City of Exeter." The evidence showed that the defendant had defrauded the "National Granite State Bank of Exeter." The variance was held immaterial.

"It is impossible, therefore, to suppose that the omission of the words "of Exeter" could have in any way misled the defendant, or failed to convey to his mind what bank was intended to be referred

to. It is manifest, therefore, that the omission could not have operated in his prejudice."

It is immaterial who actually owned and operated the carrier having possession of the goods. The essential thing is that the goods, at the time of the theft were still in the custody of the carrier as a part of an interstate shipment, and the name of the carrier is sufficiently alleged for identification.

> " 'If the sense be clear, nice exceptions ought not to be regarded' and 'unseemly niceties should not be indulged', nor 'an overeasy ear be given to exceptions whereby more offenders escape than by their own innocence, to the shame of the government, to the encouragement of villany, and to the dishonor of God.' "

United States vs. Howard, 132 Fed. 333.

IV.

Defendant contends that the evidence was not sufficient to go to the jury as the tubes in the possession of the jury were not identified as the tubes that were stolen.

Briefly stated, the evidence is that the defendant was the authorized agent of the consignee to

receive the goods from the carrier (Trans. p. 41), and was the only person who ever called for the consignee's shipments (Trans. p. 44); that he knew that this particular shipment had been lost (Trans. p. 43); that he had discussed the loss (Trans. p. 45); that he had in his possession at a later date a box containing the exact number, sizes, and make of tubes contained in the lost shipment (Trans. p. 45, 46); that he sold these tubes at a price below the market value (Trans. p. 45, 46); and endeavored to induce one Cohen to make a false statement regarding the manner in which the tubes came in his possession (Trans. p. 45, 46).

There is no rule of law, so far as we know, that requires the proof of a fact beyond every possible and fanciful doubt. Neither courts nor juries are required to cast about for possible explanations which the defendant fails to offer. It is true that the identification is by circumstantial evidence, but "all evidence is more or less circumstantial, the difference being only in degree; and it is sufficient for the purpose when it excludes disbelief; that is, actual and not technical, disbelief, for he who is to pass on the question is not at liberty to dis-

believe as a juror, while he believes as a man." (Jones Commentaries on Evidence, Sec. 6d).

> "The only alleged error * * * is the refusal of the court below to direct a verdict of acquittal * * * * upon the ground that the evidence was not sufficient to justify a finding that he had knowledge, when the goods came into his possession, that they had been stolen. There was, it is true, no direct evidence that he had such knowledge. But after a careful examination of the record, and bearing in mind the rule that to justify a conviction of crime on circumstantial evidence, the latter must be such as to exclude every reasonable hypothesis but that of guilt, we think that the inference could be legitimately drawn, from all the facts and circumstances which the testimony discloses, that he did have the requisite knowledge.
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> * * * *
>
> "When one, charged with having stolen goods in his possession, makes a statement to the public authorities as to how he came to have them, and later, under oath, makes an entirely different statement, it seems quite

impossible, in the light of other circumstances above detailed, to escape the conclusion that reasonable men would be justified in drawing the inference therefrom that he knew or believed that the goods had been stolen. If he had come by them honestly or had no knowledge or reason to believe that they had been stolen, it is inconsistent with ordinary human conduct that he should have made two such utterly variant and irreconcilable explanations. In view of the contradictory statements, and the other circumstances of the case, the only hypothesis of innocence is that he had obtained possession of them in either one of the two ways he had stated. It was unquestionably for the jury to decide whether either of the explanations which he gave was true, and if neither were, they were certainly justified, in the light of other circumstances in the case, in reaching the conclusion that he knew or believed that the goods had been stolen when he acquired them."

Chass v. United States, 258 Fed. 910.

The defendant was present at the trial and, while he was not required to make any explanation,

he had the right and the opportunity to do so. Without some explanation, the evidence would exclude every reasonable conclusion but that the goods in the defendant's possession were the same goods that had been stolen, and that is all that is required.

V.

Defendant contends that, as he was the authorized agent of the consignee to receive the goods from the carrier, he could not be guilty of stealing them.

Defendant was the agent of the consignee and not of the carrier and his authority over the shipment extended only from the time the carrier made delivery to the consignee (Trans. pp. 41, 42, 43, 44, 49). It will be noted that the citations of defendant in support of his contention refer to cases where delivery had been made and the carrier relinquished control. Delivery in this case had not been made, in fact, the defendant himself made demand on the carrier for delivery after the shipment had disappeared (Trans. pp. 42, 43).

It is suggested that he is guilty of embezzlement and not larceny, but he could not be guilty

of embezzlement from the carrier as he was not the agent or employee of the carrier and all the evidence is to the effect that the goods were taken while under the carrier's control (Trans. pp. 42, 43, 44, 45).

We believe that no error was committed by the trial court, that the defendant was correctly informed of the charge he was called upon to meet, that the case was fairly presented to the jury, and that the verdict is in accord with the law and the evidence. For these reasons we believe that the judgment of the trial court should be sustained.

Respectfully submitted,

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